Schwarz Partners Packaging, LLC d/b/a MaxPak *and* United Steelworkers International Union. Case 12–CA–109207

June 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

The General Counsel seeks summary judgment in this case on the ground that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(5) and (1) of the Act. Pursuant to a charge filed on July 16, 2013, by the United Steelworkers International Union (the Union), the Acting General Counsel issued the complaint on August 1, 2013, alleging that Schwarz Partners Packaging, LLC d/b/a MaxPak (the Respondent) violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by withdrawing recognition from the Union. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.[1]

Among other things, the complaint alleges, and the Respondent's answer admits, that following the Union's certification on November 6, 2012, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive bargaining representative of the unit; that the Respondent thereafter met and bargained with the Union with respect to the terms of an initial bargaining agreement in January 2013; that the Respondent agreed to schedule additional bargaining sessions to be held in March 2013; and that about March 15, 2013, it cancelled those additional sessions and informed the Union that it would file a lawsuit challenging the Board's authority, challenging the Union's certification, and seeking to enjoin the General Counsel from pursuing any unfair labor practice charges based on the Union's certification alleging the Respondent's refusal to bargain.

On August 22, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On August 23, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but argues that it is seeking to contest the validity of the Union's certification on the basis of its contention that the Board lacked a quorum at relevant times in the underlying representation proceedings. In this regard, the Respondent contends that the President's January 4, 2012 recess appointments to the Board were not valid, and therefore, the Board did not have a quorum at the time it considered the parties' objections to the first election and issued its August 29, 2012 Decision and Direction in Case 12–RC–073852. The Respondent argues that, in the absence of a Board quorum, the Union was never lawfully certified following the second election that was held pursuant to the August 29, 2012 Decision and Direction. The Respondent further asserts that this is a "simple" test-of-certification case, that it did not withdraw recognition from the Union, and that the requested "notice reading" remedy is not warranted.[2]

We find no merit in the Respondent's belated contention that it has no bargaining obligation because the Board lacked a quorum at the time that the August 29, 2012 Decision and Direction issued and when the Regional Director issued the underlying certification of representative in Case 12–RC–073852. In this regard, we find that the Respondent waived its right to challenge the validity of the certification when it entered into negotiations with the Union. *Professional Transportation, Inc.*, 362 NLRB No. 60, slip op. at 2 (2015); *Hospital of Barstow, Inc. d/b/a Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 1, fn. 5 (2014). Thus, to preserve its right to challenge the Union's certification, the Respondent was required to avail itself of the well-established test-of-certification procedures, namely, refusing to bargain and later defending against the resulting refusal-to-bargain complaint by asserting an affirmative defense that the certification was improper. See *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (refusal to bargain "sets up judicial review of

[1] The General Counsel's motion refers to this matter as a test-of-certification proceeding, or alternatively, a withdrawal of recognition case, and the Respondent's response refers to it as a "simple test of certification" proceeding. We find, however, for the reasons explained below, that the Respondent waived its right to challenge the validity of the certification when it entered into negotiations with the Union.

[2] The Respondent also argued that the Board should hold this matter in abeyance pending the Supreme Court's consideration of the recess appointment issue in *NLRB v. Noel Canning*. At the time the Respondent filed its response to the Notice to Show Cause, the Supreme Court was considering challenges to the President's January 4, 2012 recess appointments to the Board. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

an election certification that is otherwise insulated from direct review"). The Board, with court approval, has long held that an employer that fails to follow this procedural course, and instead commences bargaining, waives the right to contest the certification. See *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995); *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326–327 (8th Cir. 1984); *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968); *Peabody Coal v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984) (observing that an employer jeopardizes its certification challenge by consulting with a union), overruled on other grounds, *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996). "Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid." *Technicolor*, 739 F.2d at 327.

In the instant matter, the complaint alleges, and the answer admits, that following the Union's request that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, the Respondent bargained with the Union on January 8, 9, and 10, 2013,[3] subsequently agreed to schedule new collective-bargaining meetings with the Union to be held on March 19, 20, and 21, 2013, and thereafter, on about March 15, 2013, it cancelled those sessions and has refused to bargain with the Union since that date. Under these circumstances, we find that the Respondent has waived its right to challenge the validity of the Union's certification.[4]

In addition, we find that there are no issues warranting a hearing because the Respondent has admitted the crucial factual allegations of the complaint, as set forth above. Although the Respondent denies that it withdrew recognition from the Union, its denial is not supported by any argument that would establish the existence of a genuine issue of material fact regarding this issue. Rather, its denial of this allegation appears to be premised on an implicit assertion that it never recognized the Union, rather than a claim that it is continuing to recognize Union. Accordingly, we grant the Motion for Summary Judgment.[5]

On the entire record, the Board makes the following

[3] The Respondent denies the complaint allegation that it bargained with the Union on January 7, 2013.

[4] Id.; *Hospital of Barstow, Inc. d/b/a Barstow Community Hospital,* supra.

[5] The Respondent's requests that the complaint be entirely dismissed and that it be awarded attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. §504, and any other relief that is just and proper, are therefore denied.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Indiana corporation, with an office and place of business located in Lakeland, Florida has been engaged in the manufacture, distribution, and sale of corrugated sheets, boxes, and packaging.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, purchased and received at its Lakeland, Florida facility goods valued in excess of $50,000 directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following an election on March 15, 2012, and a second election held on October 19, 2012, the Union was certified on November 6, 2012, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance and production employees employed by the Employer at its facility located at 2808 New Tampa Highway, Lakeland, Florida, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On about November 14, 2012, the Union, by letter, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit.

On about January 8, 9, and 10, 2013, the Respondent met and bargained with the Union with respect to the terms of an initial collective-bargaining agreement.

In January or February 2013, the Respondent agreed to schedule new collective-bargaining meetings with the Union to be held on March 19, 20, and 21, 2013.

By email dated March 15, 2013, the Respondent cancelled "any bargaining sessions with the Union, including, but not limited to, the sessions scheduled for … March 19, 20, and 21, 2013," and informed the Union that it would file a lawsuit challenging the Board's authority to issue the Decision and Direction in Case 12–

RC–073852, challenging the Union's certification, and seeking to enjoin the Acting General Counsel from pursuing any unfair labor practice charges based on said certification.

Since about March 15, 2013, the Respondent has withdrawn its recognition of the Union and has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that this withdrawal of recognition and the failure and refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

Since about March 15, 2013, by withdrawing recognition from and subsequently failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

The complaint also requests an extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962). We agree that such a remedy is warranted where, as here, an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005); *Van Dorn Plastic Machinery Co.,* 300 NLRB 278, 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). The appropriate length of the extension must be determined by considering "the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations." *Northwest Graphics, Inc.*, 342 NLRB at 1289.

In *Glomac Plastics*, 234 NLRB 1309 fn. 4 (1978), enfd. in relevant part 592 F.2d 94, 101 (1979), the Board affirmed the judge's recommendation that the certification year begin anew upon the Respondent's recommencement of good-faith bargaining, where the Respondent's bad-faith bargaining commenced 9-1/2 months after certification. The Board held that, under proper circumstances, a complete renewal of a certification year may be granted even where the Respondent engaged in some good-faith bargaining in the prior certification year.

Here, the Union was certified as the exclusive collective-bargaining representative of the unit employees on November 6, 2012, and the parties held their only bargaining sessions on January 8, 9, and 10, 2013. As the complaint alleges and the Respondent's answer admits, on March 15, 2013, the Respondent cancelled "any bargaining sessions with the Union, including, but not limited to the sessions scheduled for . . . March 19, 20, and 21, 2013," and informed the Union that it would challenge its certification and seek to enjoin the General Counsel from pursing any charges alleging that its refusal to bargain was unlawful.

Thus, the fact that the Respondent may have engaged in some good-faith bargaining in the first month of 2013 does not, by itself, preclude a 12-month extension of the certification year, as the Respondent, by its conduct, effectively precluded any meaningful bargaining for the majority of the certification year. In these circumstances, we find that a full 1-year extension of the certification year is warranted, beginning when the parties commence good-faith negotiations, *Mar-Jac Poultry Co*., supra; accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).[6]

ORDER

The National Labor Relations Board orders that the Respondent, Schwarz Partners Packaging, LLC d/b/a MaxPak, Lakeland, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steelworkers International Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Withdrawing recognition from the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employ-

[6] The General Counsel further requests that the Respondent be required to read the Board's remedial notice to assembled employees during paid working hours. We find that the General Counsel has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. *Fallbrook Hospital Corp. d/b/a Fallbrook Hospital,* 360 NLRB No. 73, slip op. at 1, fn. 3 (2014).

ees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time maintenance and production employees employed by the Employer at its facility located at 2808 New Tampa Highway, Lakeland, Florida, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Lakeland, Florida, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist a union
>
> Choose representatives to bargain with us on your behalf
>
> Act together with other employees for your benefit and protection
>
> Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Steelworkers International Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time maintenance and production employees employed by us at our facility located at 2808 New Tampa Highway, Lakeland, Florida, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

SCHWARZ PARTNERS PACKAGING, LLC D/B/A MAXPAK

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Board's decision can be found at www.nlrb.gov/case/12-CA-109207 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.